

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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ARENDI USA, INC., ET AL. * C.A. 02-343T

VS. * 3:30 P.M.

* SEPTEMBER 17, 2004

MICROSOFT CORPORATION, ET AL. *

* PROVIDENCE, RI

* * * * *

BEFORE THE HONORABLE ERNEST C. TORRES

CHIEF DISTRICT JUDGE

(CLAIM CONSTRUCTION HEARING)

APPEARANCES:

FOR ARENDI U.S.A. INC:

MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY & POPEO, PC
BY: PAUL J. HAYES, ESQUIRE
BY: EUGENE A. FEHER, ESQUIRE
ONE FINANCIAL CENTER
BOSTON, MA 02111

TAYLOR, DUANE, BARTON & GILMAN,
LLP
BY: SHERI L. PIZZI, ESQUIRE
10 DORRANCE STREET - SUITE 700
PROVIDENCE, RI 02903

1 FOR MICROSOFT CORPORATION:

2 FISH & RICHARDSON, P.C.
3 BY: FRANK E. SCHERKENBACH, ESQ.
4 BY: CRAIG R. SMITH, ESQUIRE
225 FRANKLIN STREET
BOSTON, MA 02110-2804

5 FISH & RICHARDSON, P.C.
6 BY: JENNIFER K. BUSH, ESQUIRE
12390 EL CAMINO REAL
7 SAN DIEGO, CA 02130

8 EDWARDS & ANGELL
9 BY: PATRICIA SULLIVAN, ESQUIRE
2800 FINANCIAL PLAZA
10 PROVIDENCE, RI 02903

11 ISABELLA FU, ESQUIRE
12 MICROSOFT IN-HOUSE COUNSEL

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COURT REPORTER: ANGELA M. GALLOGLY, RPR
ONE EXCHANGE TERRACE
PROVIDENCE, RI 02903

1 SEPTEMBER 17, 2004 - 3:30 P.M.

2 THE COURT: GOOD AFTERNOON.

3 THE CLERK: THIS IS CIVIL ACTION 02-03, ARENDI
4 USA ET AL., VERSUS MICROSOFT CORPORATION.

5 THE COURT: THIS CASE IS HERE FOR ARGUMENT WITH
6 RESPECT TO THE ISSUE OF CLAIM CONSTRUCTION.

7 MR. SCHERKENBACH, WHAT DO YOU HAVE TO SAY?

8 MR. SCHERKENBACH: THANK YOU, YOUR HONOR.

9 I'LL DEAL WITH THE TWO MAJOR ISSUES, YOUR HONOR,
10 IN THE FOLLOWING ORDER: FIRST, THE UPON A SINGLE ENTRY
11 LIMITATION AND THEN THE ANALYZING LIMITATION, UNLESS,
12 OF COURSE, YOU WANT TO DO SOMETHING ELSE, I'LL JUST
13 FOLLOW THAT ORDER. AND LET ME START BY JUST COMMENTING
14 ON THE CONSTRUCTIONS THAT ARENDI PROVIDED, I DON'T KNOW
15 IF IT WAS LATE YESTERDAY OR TODAY, BUT THE SUPPLEMENTAL
16 CONSTRUCTIONS THAT THEY SENT TO YOU AND MAKE SOME
17 OBSERVATIONS ON THAT, FIRST OF ALL.

18 ON THE UPON A SINGLE ENTRY OF THE EXECUTE
19 COMMAND INSTRUCTION, REALLY, THEIR PROPOSAL FOR WHAT
20 THAT LANGUAGE MEANS, SIMPLY, REPEATS THE WORDS IN THE
21 CLAIM, AND, IN PARTICULAR, REPEATS THE WORD SINGLE
22 WITHOUT CONSTRUING WHAT THAT MEANS. AND THAT, REALLY,
23 IS THE ENTIRE DISPUTE OVER THAT LIMITATION, IS WHETHER
24 SINGLE MEANS WITHOUT THE USER TAKING OTHER STEPS OR
25 NOT.

1 THE PROSECUTION HISTORY ON THAT ONE IS, IN OUR
2 VIEW, CLEAR, AND I'M GOING TO GO INTO THAT IN A MINUTE,
3 BUT I WANTED TO MAKE ONE OTHER OBSERVATION, AND THAT
4 IS, ESSENTIALLY, THAT THEIR CONSTRUCTION, ESSENTIALLY,
5 READS THE WORD "SINGLE" OUT OF THE CLAIM, AND THIS IS
6 NOT AN ARGUMENT THAT WE FOCUSED ON IN THE BRIEF, BUT IF
7 YOU THINK ABOUT IT, IN ESSENCE WHAT ARENDI IS SAYING IS
8 IT DOESN'T MATTER HOW MANY STEPS YOU HAVE BEFORE YOU
9 GET TO THE POINT THAT THEY WANT TO CALL A SINGLE ENTRY,
10 YOU COULD HAVE TWO OR THREE OR FOUR OR FIVE, AS LONG AS
11 THERE IS AT LEAST ONE. THAT ARGUMENT CAN'T BE CORRECT,
12 BECAUSE IT MEANS THAT SINGLE DOESN'T MEAN ANYTHING.
13 ANYTIME THAT YOU HAD ONE OR MORE ENTRIES IN THE EXECUTE
14 COMMAND, YOU WOULD HAVE AT LEAST A SINGLE ENTRY OF THE
15 EXECUTE COMMAND, AND BY THEIR LOGIC, PRESUMABLY, YOU
16 COULD POINT TO ANY ONE OF THOSE COMMANDS WHENEVER IT
17 OCCURRED IN THE CHAIN OF EVENTS.

18 SO I THINK EVEN WITHOUT RELYING ON THE
19 PROSECUTION HISTORY, WHICH YOU ARE NOT ONLY ENTITLED TO
20 DO, BUT I THINK SHOULD DO, THEIR ARGUMENT ON ITS FACE
21 ON SINGLE ENTRY CAN'T BE ACCEPTED. IF WE GO INTO THE
22 PROSECUTION HISTORY, TO WHATEVER EXTENT THERE'S ANY
23 AMBIGUITY AS TO WHAT THIS PHRASE "UPON A SINGLE ENTRY"
24 MEANS, ARENDI LEFT NO DOUBT BASED ON WHAT IT SAID
25 DURING THE PROSECUTION HISTORY. AND I'D LIKE TO, FIRST

1 OF ALL, YOUR HONOR, I THINK ONE THING WOULD BE HELPFUL
2 IS FOR YOU TO SEE, AT LEAST THE HIGHLIGHTS OF THIS
3 PANDIT PATENT, WE PUT THIS IN OUR BRIEF, AND I'M NOT
4 GOING TO GO OVER EVERY GORY DETAIL, BUT YOU'LL RECALL
5 PANDIT WAS THE FIRST PATENT USED TO REJECT ARENDI'S
6 APPLICATION, AND IN RESPONSE, ARENDI DID TWO THINGS:
7 THEY ARGUED ABOUT WHAT THE DISTINCTIONS WERE, AND THEY
8 ALSO CHANGED THE CLAIM, THEY CHANGED THE CLAIM TO ADD
9 THIS UPON A SINGLE ENTRY LIMITATION. AND IF YOU LOOK
10 AT -- PANDIT IS HERE ON THE SCREEN, YOUR HONOR -- JUST
11 TO SORT OF SET THE BACKGROUND HERE IN THE ABSTRACT,
12 THIS PATENT IS ABOUT RECOGNIZING TEXT OF A
13 PREDETERMINED KIND IN THE BODY OF THE TEXT. AFTER
14 RECOGNITION, OPERATIONS RELEVANT TO THE RECOGNIZED TEXT
15 MAY BE PERFORMED. SO THIS IS RIGHT UP THE ALLEY OF THE
16 ARENDI INVENTION. AND THE DIFFERENCE, THE ONLY
17 DIFFERENCE THAT ARENDI POINTED TO -- LET ME PUT IT THAT
18 WAY -- THE ONLY DIFFERENCE THEY POINT TO WAS THIS
19 REQUIREMENT IN PANDIT THAT THE USER SOMEHOW ACCENT THE
20 TEXT. IF YOU COMPARE THIS, AND I DIDN'T BRING THIS
21 GRAPHIC WITH ME, BUT IF YOU ACTUALLY PUT THIS FIGURE OF
22 PANDIT SIDE BY SIDE WITH FIGURE 1-A OF THE PATENT, FOR
23 EXAMPLE, THE FLOW CHARTS ARE UNCANNILY SIMILAR, EXCEPT
24 FOR THE REQUIREMENT IN PANDIT THAT THE TEXT BE
25 ACCENTED. LET ME JUST TALK THROUGH THIS ONE.

1 SO AFTER THE TEXT IS ACCENTED, DOES IT GET
2 RECOGNIZED; SO THAT'S THE ANALYSIS STEP IN PANDIT, I
3 DON'T THINK THERE'S ANY DISPUTE ABOUT THAT. AFTER IT'S
4 RECOGNIZED, THE USER CAN GET TO A MENU, PULL DOWN THE
5 MENU, SELECT AN ACTION FROM THE MENU. THAT PART OF IT
6 IS SOUNDING AN AWFUL LOT LIKE SMART TAGS, WHICH, IN A
7 WAY, IS OUR POINT AS WELL. BUT THIS IS DISTINGUISHED
8 ONLY ON THE BASIS OF THIS TEXT SELECTION BOX UP HERE
9 WHERE I'M TAPPING ON THE SCREEN. IF YOU NOW LOOK AT --
10 LET'S PUT UP FIGURE 1-A, TRY THAT.

11 AND ABOVE THE BOX 6, YOUR HONOR -- ACTUALLY,
12 JUST PUT IT BACK THE WAY IT WAS PATTY, I'M GOING TO
13 DRAW A LINE HERE.

14 THE COURT: IS THAT FIGURE 1-A THAT YOU JUST PUT
15 UP FROM THE ARENDI PATENT?

16 MR. SCHERKENBACH: IT IS, YOUR HONOR, YES. SO
17 YOU'VE GOT FIGURE 2 FROM PANDIT ON THE LEFT, YOU HAVE
18 FIGURE 1-A OF THE ARENDI PATENT ON THE RIGHT.

19 AND LET ME JUST DRAW A LINE HERE AFTER THE FIRST
20 TWO BOXES. THE DIFFERENCE IS IN, IF YOU LOOK ON THE
21 RIGHT ON THE ARENDI FIGURE, THERE'S NOTHING ABOUT
22 ACCENTING OR SELECTING TEXT. IT STARTS WITH THE USER
23 HITTING A BUTTON. ALL OF THESE ASSUME THE USER HAS
24 ALREADY TYPED WHATEVER TEXT WE'RE TALKING ABOUT. THE
25 QUESTION IS WHAT HAPPENS AFTER THE USER TYPES THE TEXT.

1 AND HERE, IN ARENDI'S, YOU HIT THE BUTTON, THE ANALYSIS
2 HAPPENS, AND IT, IN SUBSEQUENT STEPS, YOU CAN SELECT
3 YOUR OPERATION, WHETHER IT'S INSERT ADDRESS, FOR
4 EXAMPLE, DOWN HERE IN -- I'LL CIRCLE THE INSERT ADDRESS
5 PART, WHICH CORRESPONDS TO THE OPERATION OVER HERE ON
6 THE LEFT TO BOX, I GUESS IT'S 25 IN PANDIT, THE ONLY
7 DIFFERENCE IS, AGAIN, ACCENT TEXT. THERE IS NO SIMILAR
8 BOX IN THE ARENDI PATENT. AND THAT IS THE DIFFERENCE
9 THAT ARENDI FOCUSED ON IN THE PROSECUTION.

10 THIS DIFFERENCE IN PANDIT IS REFLECTED IN THE
11 CLAIMS AS WELL. LET ME JUST SHOW YOU CLAIM 1.

12 THE COURT: WHAT DOES THIS HAVE TO DO WITH THE
13 CONSTRUCTION OF A TERM, "UPON A SINGLE ENTRY OF THE
14 EXECUTE COMMAND"?

15 MR. SCHERKENBACH: IT IS, TO THE EXTENT THAT
16 THERE'S ANY AMBIGUITY IN WHAT THAT CLAIM TERM MEANS OR
17 PHRASE MEANS. WHAT HAPPENED DURING THE PROSECUTION
18 DEFINES IT TO MEAN NO PRIOR USER SELECTIONS OR ENTRIES
19 OF THE EXECUTE COMMAND OF ANY KIND. AND THAT IS THE
20 CORE DISPUTE IN THE CASE. WHAT DOES SINGLE MEAN; I
21 MEAN, AGAIN, IF ALL IT MEANS THEY HAVE TO FIND A CLICK
22 SOMEWHERE IN THE PROGRAM, OUR VIEW IS IT DOESN'T MEAN
23 ANYTHING AT ALL. IT READS, AT LEAST READS SINGLE OUT
24 OF THE CLAIM, IT MIGHT AS WELL JUST SAY AN ENTRY OF THE
25 EXECUTE COMMAND, ANY ENTRY OF THE EXECUTE COMMAND.

1 SINGLE HAS TO MEAN SOMETHING. AND, IN PARTICULAR, IT
2 DOESN'T MEAN MORE THAN ONE. AND IN A PARTICULAR
3 CONTEXT OF THIS PATENT, AND THE WAY IT GOT EXAMINED AND
4 THE WAY IT GOT ISSUED, THE PATENT EXAMINER KNEW WHAT
5 THAT MEANT AND ARENDI KNEW WHAT IT MEANT, BECAUSE THEY
6 ADDED IT SPECIFICALLY TO DISTINGUISH THINGS LIKE
7 PANDIT, AND THEY SAID THE SAME THING ABOUT THE TSO
8 PATENT, I WON'T GO THROUGH ALL THAT. BUT EACH TIME TO
9 DISTINGUISH THESE PRIOR PATENTS THAT HAD SOME SORT OF
10 USER SELECTION, THERE WAS NO SPECIAL KIND, IT COULD
11 HAVE BEEN ACCENTING OR HIGHLIGHTING, MOVING YOUR MOUSE
12 INTO IT OR MOVING YOUR CURSOR ON IT, ALL OF THOSE
13 METHODS WERE DISCLOSED IN PANDIT AND TSO AND ARENDI
14 SAID THAT'S NOT MY INVENTION, AND POINTED TO THIS VERY
15 LANGUAGE IN THE CLAIM TO MAKE THAT CLEAR.

16 NOW, I THINK, ACTUALLY, ON THE UPON A SINGLE
17 ENTRY ISSUE, I DON'T HAVE MUCH MORE TO ADD TO THAT. IF
18 IT'S CONSTRUED TO BE ONLY ONE, FRANKLY, WE THINK IT'S
19 THE END OF THE CASE.

20 NOW, IF WE GO ON TO ANALYSIS, THIS ONE IS A
21 LITTLE MORE COMPLICATED, ADMITTEDLY.

22 MR. HAYES: YOUR HONOR, WOULD YOU LIKE ME TO
23 RESPOND TO THAT FIRST?

24 THE COURT: NO, YOU'LL HAVE A CHANCE TO RESPOND
25 WHEN -- YOU'RE SUGGESTING WE TAKE THIS TERM-BY-TERM

1 UPON A SINGLE ENTRY?

2 MR. HAYES: YES, ONLY BECAUSE -- IT'S UP TO YOU,
3 EITHER WAY, BUT IT MIGHT MAKE IT SORT OF CLEARER TO YOU
4 THE RESPECTIVE POSITIONS.

5 THE COURT: DO YOU HAVE ANY PREFERENCE?

6 MR. SCHERKENBACH: WHATEVER HELPS YOU MORE, YOUR
7 HONOR.

8 THE COURT: I DON'T KNOW IF IT'S GOING TO HELP
9 ME MORE, BUT LET'S TRY IT.

10 HAD YOU FINISHED YOUR PRESENTATION OF UPON A
11 SINGLE ENTRY?

12 MR. SCHERKENBACH: I THINK I AM, YES.

13 MR. HAYES: AND I WILL TRY TO USE YOUR ELMO,
14 JUDGE, HOPEFULLY. I'LL BE VERY BRIEF.

15 FIRST OF ALL, THERE IS NO AMBIGUITY IN THAT
16 LANGUAGE OF THAT CLAIM. THIS IS THE TESTIMONY -- LET
17 ME SEE IF IT'S -- THIS IS THE TESTIMONY, YOUR HONOR, OF
18 MR. CROFT, THEIR EXPERT, WHO AGREES IN HIS OWN
19 LANGUAGE, THERE'S NOTHING AMBIGUOUS ABOUT CLAIM 1, AND
20 PARTICULARLY, THAT LANGUAGE THEREIN.

21 SECONDLY, "UPON" MEANS AFTER, "SINGLE" MEANS
22 ONE. THAT'S IT. AND IT SAYS, "UPON ENTRY OF AN
23 EXECUTE COMMAND BY AN INPUT DEVICE." THAT'S THE WHOLE
24 IDEA. YOU HAVE TO IDENTIFY THE INPUT DEVICE, WHICH, IN
25 THIS CASE, IS THE MENU. AND THEN UPON THAT CLICK, ONE

1 SINGLE ENTRY, ALL OF THIS STUFF THAT COMES NEXT
2 ANALYZING, ETC., HAPPENS. END OF STORY.

3 THE COURT: SO YOUR POSITION, THEN, IS NO MATTER
4 HOW MANY ACTIONS ARE REQUIRED TO GET TO THE INPUT
5 DEVICE IN YOUR EXAMPLE, MENU, THAT THAT'S A
6 SINGLE-CLICK SYSTEM?

7 MR. HAYES: THAT'S IRRELEVANT. MY POSITION IS
8 WHAT YOU HAVE TO GET TO, TO GET TO THE MENU, IS
9 IRRELEVANT. AND THE REASON I SAY THAT IS YOU HAVE TO
10 CLICK THE COMPUTER ON TO START IT. THEIR FIRST
11 ORIGINAL THOUGHT WAS THEIR MULTIPLE CLICK THEORY; AH,
12 FIRST WE HAVE TO CLICK IT ON, AND THEN WE HAVE TO DO
13 THIS, AND THEN WE HAVE TO DO THAT. THIS IS THE EXACT
14 LANGUAGE THAT WAS ALLOWED BY THE PATENT OFFICE OVER THE
15 PRIOR ART. PERIOD. IT'S UNAMBIGUOUS. AND I THINK AS
16 A MATTER OF LAW, YOU SIMPLY CANNOT START REWRITING THE
17 CLAIMS.

18 WHAT I SUGGEST, WHAT THEY'RE TRYING TO DO, IS
19 THEY KNOW NOW THAT BECAUSE THEY HAVE KICKED OUT
20 INFRINGEMENT UNDER THE DOCTRINE OF EQUIVALENTS, THEIR
21 ARGUMENT OF FILE WRAPPER ESTOPPEL, AS A MATTER OF LAW,
22 IS GONE, THAT'S BLACK LETTER LAW. NOW, THEY'RE TRYING
23 TO, THROUGH CLAIM CONSTRUCTION, READ LIMITATIONS IN
24 WHICH SIMPLY CAN'T BE DONE.

25 I SUGGEST TO YOU, AND THIS IS JUST MY ARGUMENT,

1 THAT, IN FACT, THAT LANGUAGE IS NOT AMBIGUOUS, IT IS
2 CLEAR AS A BELL, AND IT DEFINES THE INVENTION. IT
3 DEFINES WHAT HEDLOY SAID AND WHAT THIS IS ALL ABOUT:
4 ONE CLICK ON THE MENU, AND ALL OF THIS WONDERFUL STUFF
5 CAN HAPPEN.

6 NOW, MY BROTHER SAYS, WELL, THAT DOESN'T MEAN
7 ANYTHING WITH ONE CLICK. OF COURSE IT DOES. BECAUSE
8 BEFORE HEDLOY'S INVENTION, YOU HAD THE ONE CLICK, ONE
9 CLICK ON THE MENU, OR WHATEVER YOU HAD, AND THEN THAT
10 WOULD GIVE YOU TO OUTLOOK, AND THEN YOU WOULD HAVE TO
11 CLICK AWAY AT OUTLOOK, AND THEN YOU WOULD HAVE TO BRING
12 OUTLOOK BACK, AND THEN CLICK AWAY AGAIN. THAT'S THE
13 WHOLE PURPOSE OF THIS INVENTION, ONE BUTTON/ONE CLICK
14 AND THAT'S THE ISSUE.

15 AND, IN FACT, THAT'S PRECISELY WHAT MY BROTHER
16 TOLD THE JURY IN HIS OPENING THAT THIS INVENTION IS
17 ABOUT.

18 THE COURT: WHAT DO YOU THINK THE EXECUTE
19 COMMAND IS, MR. HAYES?

20 MR. HAYES: THE EXECUTE COMMAND IS WHEN YOU
21 CLICK ON THE MENU ITEM, THAT IS AN EXECUTE COMMAND, AND
22 LET ME TELL YOU WHY. BECAUSE THAT IS THE COMMAND IN
23 THE COMPUTER THAT STARTS THE BALL ROLLING BEHIND THE
24 SCENES TO SEARCH AND ALL THE REST. I MEAN, YOU'LL HEAR
25 TESTIMONY IN THIS TRIAL, IF THEY TAKE THE POSITION THAT

1 PULLING DOWN A MENU HAS SOME BIG DEAL, THEY'LL ALL
2 TESTIFY THAT, IN FACT, PULLING -- REYNAR WILL --
3 PULLING DOWN A MENU HAS BEEN OLD AS HILLS, PULLING DOWN
4 A MENU IS NOT PART OF SMART TAGS, AND, MOST
5 IMPORTANTLY, PULLING DOWN A MENU IS NOT AN EXECUTE
6 COMMAND, DOESN'T EXECUTE ANYTHING. BECAUSE IF YOU READ
7 THE PATENT IN ITS ENTIRETY, IT'S SAYING IF ONE CLICKS
8 ON THE MENU, THAT'S THE EXECUTE COMMAND, BOOM, AND THEN
9 -- MENU ITEM, YOU KNOW, WHATEVER IT IS -- AND THEN ALL
10 THESE THINGS HAPPEN; THE EXECUTE COMMAND IS TO GET ALL
11 OF THE SUBSEQUENT STEPS TO CRANK UP AUTOMATICALLY.
12 THAT'S THE WHOLE IDEA OF THE QUOTE, "EXECUTE COMMAND,"
13 BECAUSE, BY THE WAY, YOU'LL HEAR TESTIMONY THAT THE
14 ONLY TIME YOU EXECUTE A COMMAND TO HAVE TO PERFORM AN
15 ACTION, MEANING SEARCH AND INSERT, IS BOOM, ON THE
16 MENU.

17 SO THAT'S BASICALLY MY -- MENU ITEM -- AND THAT,
18 I BELIEVE, IS PRECISELY WHAT MR. SCHERKENBACH TOLD THE
19 JURY IN THE OPENING: WHAT THIS INVENTION IS ABOUT IS
20 CLICKING ONCE ON SOMETHING LIKE A BUTTON OR A MENU UPON
21 A SINGLE ENTRY ONCE AND AFTER THAT EVERYTHING
22 AUTOMATICALLY HAPPENS. AND HE IS ABSOLUTELY CORRECT
23 THAT THAT IS PRECISELY WHAT THIS INVENTION IS ABOUT.

24 NOW, IF MY BROTHER BELIEVES THAT THE CLAIM OF
25 THE PATENT IS INVALID, SO BE IT. LET HIM ARGUE IT.

1 THE COURT: SO YOUR POSITION, THEN, IS THAT
2 UNTIL ONE GETS TO THE MENU THAT THERE HAVE BEEN NO
3 ENTRIES WITHIN THE MEANING OF THIS CLAIM?

4 MR. HAYES: YES, THERE IS NO ENTRY OF AN EXECUTE
5 COMMAND, CORRECT, BECAUSE THE EXECUTE COMMAND IS,
6 OBVIOUSLY, THE COMMAND TO DO THE THINGS, SO TO SPEAK,
7 THAT FOLLOW.

8 THE COURT: AND, MR. SCHERKENBACH, YOUR POSITION
9 IS THAT THERE ARE ENTRIES OF EXECUTE COMMANDS THAT
10 PRECEDE THE CLICKING ON THE MENU OF THE DESIRED
11 OPERATION?

12 MR. SCHERKENBACH: ABSOLUTELY. AND MR. KLAUSNER
13 WILL ADMIT THAT ON CROSS-EXAMINATION. HE SAID IT IN
14 DEPOSITION THAT WHEN YOU, TO EVEN GET TO THE MENU, YOU
15 HAVE TO EXECUTE A WHOLE SERIES OF COMMANDS TO GET
16 THERE.

17 THE COURT: WHAT'S ONE OF THE COMMANDS YOU HAVE
18 TO EXECUTE TO GET TO THE MENU?

19 MR. SCHERKENBACH: WELL, IN OUR PARTICULAR
20 PRODUCT, WHEN YOU MOVE THE MOUSE OVER THE SMART TAG TO
21 GET -- THE BUTTON POPS UP, THAT'S A PIECE OF CODE THAT
22 EXECUTES, AND THAT EXECUTION IS CAUSED BY USER INPUT.
23 WHEN YOU CLICK ON THE BUTTON --

24 THE COURT: IS THAT A COMMAND, THOUGH, MOVING
25 THE CURSOR TO THE --

1 MR. SCHERKENBACH: ABSOLUTELY. YOU CAN LOOK IN
2 THE SOURCE CODE, AND THAT CAUSES A SERIES OF COMPUTER
3 COMMANDS TO OPERATE TO CAUSE THAT BUTTON TO POP UP.
4 YOU CLICK ON THE BUTTON, THAT CAUSES ANOTHER MODULE OF
5 CODE TO EXECUTE, THAT CAUSES THE MENU TO DROP DOWN.
6 THEN IF YOU EITHER CLICK ON -- OR, I'M SORRY -- MOVE
7 YOUR MOUSE DOWN TO SELECT THE MENU ITEM -- TO HIGHLIGHT
8 IT, I SHOULD SAY -- OR IF YOU DO THE DRAG, THE CLICK
9 AND DRAG THAT THEY PREFER TO SHOW, THERE IS ANOTHER
10 MODULE OF CODE THAT EXECUTES TO GET TO THE POINT WHERE
11 YOU CAN ACTUALLY SELECT THE ACTION ITEM.

12 SO THERE'S -- AND THIS IS ALL IN THE CODE, THERE
13 IS NO MYSTERY ABOUT THIS, AND WE CAN SHOW THIS VERY
14 EASILY. ONE OTHER THING ON EXECUTE COMMAND, JUDGE,
15 THEIR DEFINITION, I HEAR THEM NOW SAYING THEY WANT TO
16 CONSTRUE EXECUTE COMMAND IN A CERTAIN WAY. IT IS
17 CIRCULAR TO SAY THAT THE EXECUTE COMMAND IS WHATEVER,
18 ESSENTIALLY, WE SAY IT HAS TO BE AFTER THE SINGLE CLICK
19 AND NOTHING ELSE QUALIFIES. AND THERE IS NO BASIS IN
20 THE PATENT FOR GIVING EXECUTE COMMAND A SPECIAL
21 MEANING.

22 MR. HAYES: YOUR HONOR, IF I MAY, ON THAT ISSUE.
23 LIFE IS AN EXECUTE COMMAND IN THE SENSE THAT WHEN YOU
24 PLUG IT IN -- HERE'S WHAT THE PATENT CLAIM SAYS, IT
25 SAYS, "UPON A SINGLE ENTRY OF THE," NOT "A," "THE

1 EXECUTE COMMAND BY MEANS OF THE INPUT DEVICE THE
2 FOLLOWING THINGS HAPPEN: ANALYZE, SEARCH, INSERT."

3 THE EXECUTE COMMAND THAT WE'RE TALKING ABOUT ON
4 THIS PATENT IS OBVIOUSLY THE EXECUTE COMMAND TO, A,
5 ANALYZE -- IT STARTS, THE COMMAND, OF ANALYZING,
6 SEARCHING AND INSERTING. AND WHAT YOU'LL HEAR IN THE
7 TESTIMONY FROM MR. REYNAR AND EVERYBODY, THAT PULLING
8 DOWN A MENU IS JUST SIMPLY PULLING DOWN A MENU. IT
9 DOES NOT EXECUTE A COMMAND TO, IN FACT, DO ANY OF
10 THESE. THAT'S THE POINT. COMPUTERS ARE A LIFE OF,
11 QUOTE, "EXECUTE COMMANDS." BUT WE'RE TALKING ABOUT A
12 PARTICULAR EXECUTE COMMAND, "THE" EXECUTE COMMAND, AND
13 THERE IT IS. THAT'S PRETTY SELF-APPARENT.

14 I MEAN, HEDLOY DIDN'T INVENT THE NOTION OF
15 PULLING A MENU DOWN. I MEAN, HE DIDN'T INVENT THE
16 NOTION OF PUSHING A BUTTON TO START THE COMPUTER TO
17 HAVE IT EXECUTE COMMAND. THE EXECUTE COMMAND HAS TO BE
18 SOMETHING TO EXECUTE THE STEPS THAT ARE SET FORTH IN
19 THE CLAIM. SO THAT'S BASICALLY OUR POSITION, JUDGE.

20 THE COURT: ALL RIGHT. THANK YOU.

21 WHAT IS YOUR NEXT POINT; MR. SCHERKENBACH?

22 MR. SCHERKENBACH: WELL, BEFORE WE LEAVE EXECUTE
23 COMMAND, YOUR HONOR, IF IT MATTERS TO YOUR ANALYSIS,
24 YOU'LL NOTICE IN THE INPUT DEVICE LIMITATION IN CLAIM
25 1, MR. HAYES FOCUSED ON THE WORD "THE" EXECUTE COMMAND,

1 SUGGESTING IT IS A SPECIAL THING. THE FIRST APPEARANCE
2 OF EXECUTE COMMAND IS ACTUALLY UP HERE IN THE INPUT
3 DEVICE LIMITATION WHERE I'VE JUST DRAWN THIS LINE. AND
4 IT SAYS, "PROVIDING A DEVICE CONFIGURED TO ENTER AN,"
5 AN, A-N, "EXECUTE COMMAND. THERE IS NOTHING SPECIAL
6 ABOUT THAT PHRASE OR THAT WORD OR THAT MEANING. YOU
7 WON'T FIND ANYTHING IN THE PATENT SUGGESTING THAT IT IS
8 A SPECIAL KIND OF EXECUTE COMMAND. AND, THEREFORE,
9 THIS LATER REFERENCE WHEN IT SAYS "THE," THAT'S CLASSIC
10 PATENT DRAFTING, IT IS ANTECEDENT BASIS, IT REFERS BACK
11 TO THE ORIGINAL MENTION. I DIDN'T MEAN TO ERASE THAT
12 IF IT WAS HELPFUL. THAT ARGUMENT DOESN'T REALLY HELP
13 THEM.

14 SO IF WE GO ON TO ANALYSIS, YOUR HONOR, AND IT'S
15 THE WHOLE FIRST THING THAT'S VERY IMPORTANT TO
16 UNDERSTAND, IT'S THE WHOLE LIMITATION THAT'S, IN A
17 SENSE, DISPUTED. BOTH PARTIES HAVE, ON OCCASION,
18 SHORTCUT THIS BY SAYING JUST ANALYZE OR ANALYSIS, AND
19 THAT, ACTUALLY, IS A MISLEADING WAY TO REFER TO IT, AND
20 WE'RE AS GUILTY OF IT AS THEY ARE, BECAUSE IT'S A
21 PARTICULAR KIND OF ANALYSIS. IT'S ANALYZING THE
22 DOCUMENT TO DETERMINE IF THE FIRST INFORMATION IS
23 CONTAINED THEREIN IN THE DOCUMENT.

24 AND SO CRITICAL TO UNDERSTANDING THIS LIMITATION
25 IS CONSTRUING WHAT THE FIRST INFORMATION IS. AND

1 THERE'S A DISPUTE ABOUT THAT. AND, BASICALLY, THE
2 DISPUTE BOILS DOWN TO DOES THE FIRST INFORMATION HAVE
3 TO BE SOMETHING THAT'S VISIBLE TEXT IN THE DOCUMENT OR
4 NOT? CAN IT BE HIDDEN INFORMATION? CAN IT BE
5 METADATA? CAN IT BE BASICALLY SOMETHING THAT THE USER
6 DOESN'T SEE OR ISN'T AWARE OF? OUR POSITION IS THAT IT
7 CAN'T BE; THAT THIS INVENTION IS ALL ABOUT FINDING
8 INFORMATION THE USER HAS TYPED, WHETHER IT'S A NAME OR
9 ADDRESS AND SO FORTH. YOU SAW THE EXAMPLES THAT
10 MR. KLAUSNER WENT THROUGH FOR THE PATENT OR MR. HEDLOY
11 WENT THROUGH. EVERY ONE OF THOSE DEALS WITH VISIBLE
12 INFORMATION IN THE TEXT. THE EXAMPLES IN THE PATENT,
13 WE NOTED THESE IN THE BRIEF, BUT IN THE FIGURES OF THE
14 PATENT -- I'LL JUST PUT UP FIGURE 1-A AGAIN, LET ME
15 ERASE THAT -- YOU'RE ANALYZING WHAT THE USER HAS TYPED.
16 THAT'S FIGURE 1-A I HAVE ON THE SCREEN. FIGURE 2-A, I
17 DON'T HAVE TO MOVE MY CIRCLE, SAME PLACE, ANALYZE WHAT
18 THE USER HAS TYPED. AND IF YOU LOOK IN THE
19 SPECIFICATIONS, IT IS TO THE SAME EFFECT.

20 SO THE FIRST INFORMATION HAS TO BE SOMETHING
21 THAT'S PERCEIVABLE BY THE USER, AND IN THE EXAMPLES IT
22 IS SOMETHING THE USER HAS TYPED.

23 WE MADE THE ARGUMENT IN OUR BRIEF THAT ARENDI
24 HASN'T ACTUALLY RESPONDED TO THAT THEIR --

25 THE COURT: LET ME STOP YOU THERE. YOU SORT OF

1 LOST ME HERE. SOMETIMES IT SEEMS TO ME TO BE A RATHER
2 FINE LINE BETWEEN CLAIM CONSTRUCTION AND FACTUAL
3 FINDINGS REGARDING HOW THE INVENTION OPERATES. WHY DO
4 YOU SAY THAT FIRST INFORMATION IS SOMETHING THAT THE
5 COURT OUGHT TO CONSTRUE AS A MATTER OF LAW, OR AT LEAST
6 EXPLAIN AS A MATTER OF LAW IN THE TERMS THAT YOU HAVE
7 PUT IT IN YOUR MEMORANDUM?

8 MR. SCHERKENBACH: THE SHORT ANSWER IS BECAUSE
9 IT'S DISPUTED. AND I THINK FOR THE JURY TO UNDERSTAND
10 AND BE ABLE TO RESOLVE WHAT THAT DISPUTE IS, THEY HAVE
11 TO KNOW WHAT THE FIRST INFORMATION IS OR CAN BE. NOW,
12 WE'RE NOT CONTENDING FOR ANY SPECIAL DEFINITION HERE,
13 JUST FOR A DEFINITION THAT IS CONSISTENT WITH WHAT THE
14 PATENT SHOWS AND WHAT THE PATENT IS ABOUT.

15 ACTUALLY, I THOUGHT ABOUT THIS FURTHER, JUDGE,
16 IN PREPARATION TODAY AND LOOKED AT OUR BRIEF, IT
17 DOESN'T REALLY HAVE TO BE TEXT THAT'S TYPED BY THE
18 USER. WE'RE NOT TRYING TO READ SOME PARTICULAR
19 EMBODIMENT IN THIS CLAIM. IT COULD BE THAT SOMEBODY
20 CALLS UP A DOCUMENT AND THE TEXT IS ALREADY THERE, AND
21 THEN THE METHOD COULD OPERATE ON TEXT THAT'S ALREADY
22 THERE. BUT, CLEARLY, THIS PATENT IS ABOUT AND -- IT
23 MAKES NO SENSE OTHERWISE -- TO TALK ABOUT SOMETHING
24 THAT'S NOT VISIBLE TO THE USER. IT IS NOT ABOUT
25 ANALYZING HIDDEN CODES IN DOCUMENTS. THERE'S NO

1 SUGGESTION TO THE CONTRARY -- NO SUGGESTING SUPPORTING
2 THAT, EXCUSE ME.

3 IN FACT, WHAT I WAS GOING TO SAY, IF YOU LOOK AT
4 THE DEPENDENT CLAIMS, WE FOCUSED AN AWFUL LOT ON CLAIM
5 1 IN THIS CASE, IF YOU LOOK AT -- WE CITED THESE IN THE
6 BRIEF, I WON'T PUT THEM ALL UP -- BUT THERE IS A WHOLE
7 SET OF DEPENDENT CLAIMS, CLAIMS 8 AND 17 THROUGH 22
8 THAT GIVE EXAMPLES OF THE FIRST INFORMATION, AND IT'S
9 ALL THE CLASSIC EXAMPLES YOU HAVE ALREADY HEARD ABOUT
10 IN THE TRIAL; THE USER PUTTING IN ADDRESS AND NAME AND
11 DATE AND TIME AND TELEPHONE NUMBERS AND THINGS LIKE
12 THAT. SO THAT'S CERTAINLY CONSISTENT WITH OUR VIEW OF
13 WHAT FIRST INFORMATION MEANS.

14 AND THERE IS A SECOND SET OF DEPENDENT CLAIMS,
15 WHICH, ACTUALLY, SOME OF WHICH ARE ASSERTED IN THE
16 CASE, NUMBERS 13, 57, 62 THROUGH 66, THAT TALK ABOUT
17 INDICATING THE FIRST INFORMATION.

18 THE COURT: WELL, WHY DO YOU SAY THAT FIRST
19 INFORMATION MUST VISIBLE TO THE USER, WHAT IS THERE IN
20 THE PATENT THAT REQUIRES THAT?

21 MR. SCHERKENBACH: WELL, I MEAN, I ACKNOWLEDGE
22 THAT THE CLAIM DOESN'T SAY VISIBLE TO THE USER. IT'S
23 NOT WRITTEN THERE. BUT IT'S THE ONLY THING THAT'S
24 DISCLOSED. IF YOU, AGAIN, THE FIGURES THAT YOU SAW, I
25 DON'T KNOW IF I HAVE FIGURE 3 -- IF YOU LOOK AT FIGURE

1 3 OR FIGURE 4 OF THE PATENT, WE'LL TRY TO PUT THAT UP
2 FOR YOU, YOUR HONOR, OR YOU CAN LOOK AT A HARD COPY,
3 WHAT THE EXAMPLES ARE IS -- THERE WE GO -- THIS IS THE
4 FIRST INFORMATION, AND THIS IS FIGURE 3 OF THE PACKAGE,
5 WHICH IS NOW ON YOUR SCREEN IS AN EXAMPLE GIVEN IN THE
6 PATENT, AND THE USER TYPES THE NAME. WE COULD GO
7 THROUGH EVERY EXAMPLE IN THE PATENT AND IN EVERY SINGLE
8 CASE, IT'S SOMETHING THAT THE USER TYPES.

9 NOW, YOU COULD ACTUALLY GET THAT FROM THE
10 PREAMBLE OF THE CLAIM, WHICH IS MEANINGFUL, WE HAVEN'T
11 BRIEFED THIS SEPARATELY, BUT THE PREAMBLE DOES SAY
12 WE'RE TALKING ABOUT INFORMATION HANDLING WITHIN A
13 DOCUMENT CREATED USING AN APPLICATION PROGRAM. IT'S AN
14 APPLICATION PROGRAM. I SUPPOSE WE COULD TALK ABOUT
15 WHAT THOSE ARE. THERE ARE EXAMPLES GIVEN IN THE PATENT
16 AS TO WHAT THOSE ARE. THEY SAY THINGS LIKE WORD
17 PROCESSOR, SPREADSHEETS, AND SO FORTH. SO THERE IS NO
18 SUGGESTION ANYWHERE THAT FIRST INFORMATION CAN BE
19 SOMETHING HIDDEN FROM THE USER.

20 NOW, JUST BRIEFLY, IF I CAN RESPOND TO THEIR
21 ARGUMENTS ON ANALYZING, AND IT'S MOSTLY THE METADATA
22 AND HIDDEN CODES POINT. YOU DID HEAR YESTERDAY
23 MR. KLAUSNER DID AGREE THAT THERE'S NO REFERENCE TO
24 METADATA IN THE PATENT, THAT THERE ISN'T, OR ANYTHING
25 THAT IS METADATA. THAT'S SORT OF A CATCH-ALL PHRASE,

1 YOU WILL PROBABLY HEAR A LITTLE BIT MORE ABOUT AS THE
2 TRIAL PROCEEDS, BUT THAT IS A SORT OF A CATCH-ALL
3 PHRASE TO REFER TO INFORMATION THAT IS HIDDEN
4 INFORMATION, THAT IS SOMETHING THAT IS NOT PERCEPTIBLE
5 TO A USER WHEN THEY'RE WORKING IN THE APPLICATION.
6 IT'S THINGS LIKE HIDDEN CODES, IT'S THINGS LIKE THE
7 FORMATTING CODES THAT MAKE YOUR WORD DOCUMENT LOOK
8 NICE. NO MENTION OF IT IN THE PATENT. SO NO
9 SUGGESTION THAT THAT'S THE SORT OF INFORMATION THAT WE
10 COULD BE TALKING ABOUT.

11 I THINK, ACTUALLY, ON ANALYSIS AND ANALYZING,
12 YOUR HONOR, THAT THOSE ARE THE MAIN POINTS WE HAVE.
13 THANK YOU.

14 MR. HAYES: BUT, YOUR HONOR, JUST SLOWLY GETTING
15 BACK, I CANNOT BELIEVE WHAT I JUST HEARD FROM MY
16 BROTHER, FRANKLY.

17 IT SAYS "UPON A SINGLE ENTRY OF THE," YOU GO UP
18 THE PREVIOUS THING, IT SAYS, "PROVIDING AN INPUT DEVICE
19 TO ENTER AN EXECUTE COMMAND WHICH INITIATES A RECORD
20 RETRIEVAL PROGRAM FROM AN INFORMATION SOURCE." THAT'S
21 WHAT WE'RE TALKING ABOUT. MY BROTHER JUST QUOTES YOU
22 AND SAYS, "PROVIDING AN INPUT DEVICE TO ENTER AN
23 EXECUTE COMMAND" AND STOPS. THIS IS THE EXECUTE
24 COMMAND, PRECISELY CONSISTENT WITH WHAT I JUST GOT
25 THROUGH ARGUING THE FIRST TIME.

1 NEXT THING, ANALYZING THE DOCUMENT, THAT'S THE
2 LANGUAGE, ANALYZING THE DOCUMENT. IT DOESN'T SAY
3 ANALYZING ONLY VISIBLE PORTIONS OF THE DOCUMENT. THIS
4 ISN'T A BAR SCANNER. ALL DOCUMENTS, WHEN YOU TYPE THEM
5 IN, UNDER THE HOOD, ARE GIBBERISH WITH A MILLION
6 COMPUTERESE THAT IDENTIFY CERTAIN PARTS OF THEM.

7 WE HAVE GIVEN YOU A DEFINITION OF THE TERM
8 ANALYZE, "BREAK DOWN INTO COMPONENTS TO FIND OUT," ETC.
9 THIS IS MICROSOFT'S OWN DICTIONARY.

10 SECONDLY, MY BROTHER HIMSELF, AGAIN, IN HIS
11 OPENING EXPLAINED PRECISELY ABOUT THIS NOTION OF
12 METADATA AND WHAT'S BEHIND THE WORDS, WHERE HE SAYS --
13 WHERE HE'S TALKING ABOUT HIS PURPLE UNDERLINING, THE
14 DOTS. YOU CAN LOOK AT A WORD DOCUMENT IN WHAT'S CALLED
15 OTHER VIEW, ANOTHER VIEW, WHERE BASICALLY YOU CAN LOOK
16 UNDER THE HOOD, AND YOU CAN SEE THE CODES UNDERLYING
17 THIS DOCUMENT. THAT'S EXACTLY WHAT HAPPENS WHEN YOU
18 TYPE A WORD, THERE'S ALL THIS STUFF LIKE METADATA,
19 ETC., FOR FORMATTING UNDER THE HOOD.

20 MY BROTHER SAYS AND ADMITS METADATA IS STUFF
21 LIKE FORMATTING, AND HE TOLD YOU THAT NOWHERE IN THE
22 PATENT DOES IT SUGGEST THE NOTION OF ANALYZING
23 FORMATTING. ANSWER TO THAT? NO. COLUMN 4, RIGHT HERE
24 IN BLACK AND WHITE. COLUMN 4, LINE 33 SAYS, "THE
25 PROGRAM ANALYZES WHAT THE USER HAS TYPED IN THE

1 DOCUMENT AT STEP 4, FOR EXAMPLE, BY ANALYZING
2 PARAGRAPH/LINE SEPARATIONS/FORATTING," ETC.

3 THE COURT: WHAT DO YOU THINK FIRST INFORMATION
4 MEANS?

5 MR. HAYES: FIRST INFORMATION IS THE INFORMATION
6 THAT'S TYPED INTO THE DOCUMENT, FOR EXAMPLE, ATLE
7 HEDLOY, THAT'S FIRST INFORMATION.

8 THE COURT: DO YOU THINK IT HAS TO BE VISIBLE TO
9 THE USER?

10 MR. HAYES: WHAT? THE FIRST INFORMATION -- NOT
11 WHEN IT'S BEING ANALYZED, NOTHING IS VISIBLE TO THE
12 USER.

13 THE COURT: NO, NO, I'M STARTING WITH THE TERM
14 FIRST INFORMATION.

15 MR. HAYES: FIRST INFORMATION?

16 THE COURT: YES.

17 MR. HAYES: THE FIRST INFORMATION IS WHAT IS
18 TYPED INTO THE DOCUMENT. THE FIRST INFORMATION THAT'S
19 BEING ANALYZED IS THE COMPUTERESE INSIDE THE HOOD
20 REPRESENTATIVE OF THAT TEXT STRING AND THE FORMATTING
21 SURROUNDING IT, SO THAT YOU CAN FIND IT.

22 THE COURT: LET ME BE A LITTLE MORE PRECISE, IF
23 I CAN. I'M REFERRING TO THE ELEMENT, ANALYZING THE
24 DOCUMENT TO DETERMINE IF THE FIRST INFORMATION IS
25 CONTAINED THEREIN. AND I'M TRYING TO FOCUS ON FIRST

1 INFORMATION, BECAUSE THAT'S ONE OF THE TERMS THAT
2 MR. SCHERKENBACH WANTS TO BE CONSTRUED IN THE WAY THAT
3 HE IS SUGGESTING.

4 MY QUESTION IS WHAT YOU DO THINK FIRST
5 INFORMATION MEANS?

6 MR. HAYES: IS THE DOCUMENT, FOR EXAMPLE -- IS
7 THE INFORMATION THAT YOU TYPE INTO THE DOCUMENT. LIKE,
8 FOR EXAMPLE, I'M TYPING ALONG --

9 THE COURT: I UNDERSTAND.

10 MR. HAYES: -- JOHN JONES.

11 THE COURT: BUT MR. SCHERKENBACH SAYS THAT IT
12 HAS TO BE VISIBLE TO THE USER. WHAT DO YOU SAY ON THAT
13 POINT? IF IT'S NOT VISIBLE -- IF I'M UNDERSTANDING --
14 YOU LOOK PUZZLED -- BUT IF I'M UNDERSTANDING HIM
15 CORRECTLY, I THINK WHAT HE IS SAYING IS THAT FIRST
16 INFORMATION SHOULD BE DEFINED AS WHAT'S IN THE DOCUMENT
17 BUT IS VISIBLE TO THE COMPUTER.

18 MR. HAYES: I DON'T WANT TO GET CONFUSED HERE.
19 OBVIOUSLY, WHAT YOU TYPE IN IS VISIBLE TO THE USER
20 UNLESS HE'S BLIND. THAT'S NOT WHAT HE'S ARGUING.

21 THE COURT: MAYBE I'M MISUNDERSTANDING HIS
22 ARGUMENT.

23 MR. HAYES: I THINK YOU'RE MISUNDERSTANDING. I
24 MEAN, OBVIOUSLY, ANYTHING YOU TYPE INTO THE DOCUMENT,
25 UNLESS YOU'RE BLIND, YOU'RE GOING TO SEE. WHAT HE IS

1 SAYING IS THAT WHEN WE GET DOWN TO -- IT SAYS,
2 ANALYZING THE DOCUMENT TO DETERMINE IF, THE "IF" IS
3 THERE, THE ATLE HEDLOY, HAYES, OR WHOEVER IT IS, IS
4 THERE.

5 NOW, THE JURY HAS TO TRY TO FIGURE OUT, THERE IS
6 A MOUND OF TESTIMONY AS TO HOW THAT'S DONE AND THE WAY
7 IT'S DONE IN THE CODE IS THAT UNDER THE HOOD, WHEN YOU
8 TYPE ATLE HEDLOY, ARE TEXT STRINGS, FORMATTING, ALL
9 THIS METADATA, THERE'S A WHOLE BUNCH OF JUNK UNDER
10 THERE. AND THEN, FOR EXAMPLE -- AND THAT IS ANALYZING
11 THE DOCUMENT AS SPECIFICALLY, BY THE WAY, AGREED TO BY
12 THEIR EXPERT, WHO, PRESUMABLY, KNOWS MORE THAN ALL OF
13 US, MAYBE. 'AND THAT FORMATTING IS IN THE FORM OF
14 WHAT'S CALLED METADATA? I BELIEVE SO. AND IF WE WERE
15 TO E-MAIL THAT DOCUMENT AFTER I TYPED IT, THE
16 FORMATTING METADATA WOULD GO WITH IT? YES.' AND THEN
17 HE SAYS --

18 THE COURT: MR. HAYES, LET'S TAKE THIS ONE STEP
19 AT A TIME.

20 MR. HAYES: SURE.

21 THE COURT: THE PROPOSED CONSTRUCTION BY
22 MR. SCHERKENBACH IS THAT ANALYZING THE DOCUMENT TO
23 DETERMINE IF THE FIRST INFORMATION IS CONTAINED THEREIN
24 MEANS COMPARING THE VISIBLE USER-ENTERED TEXT IN THE
25 DOCUMENT TO PREDEFINED TEXT OR TEXT PATTERNS. LET ME

1 STOP THERE AND SEE WHETHER YOU DISAGREE UP TO THIS
2 POINT.

3 MR. HAYES: I DO DISAGREE WITH THAT, JUDGE.

4 THE COURT: AND WHAT IS THE DISAGREEMENT?

5 MR. HAYES: THE DISAGREEMENT IS THAT ANALYZING
6 THE DOCUMENT TO DETERMINE IF FIRST INFORMATION MEANS
7 NOTHING MORE THAN LOOKING PROGRAMMATICALLY AT THE
8 COMPUTERESE THAT IS REPRESENTATIVE OR ASSOCIATED WITH
9 THE DOCUMENT UNDER THE HOOD TO DETERMINE IF IT'S THERE.
10 THAT'S HOW THESE THINGS WORK. WHEN YOU TYPE IN -- YOU
11 KNOW WHAT I'M SAYING? WHEN YOU TYPE IN "JOHN JONES,"
12 INSIDE THE COMPUTER IS NOT A LITTLE GUY THAT'S PUTTING
13 UP A J AND A J. THEY WRITE THESE XML THINGS OR TEXT
14 STRINGS.

15 THE COURT: MR. SCHERKENBACH, IS IT YOUR
16 POSITION THAT WHAT I'VE READ SO FAR MEANS THAT THE
17 PROCESS REQUIRES LOOKING ONLY AT THE VISIBLE TEXT THAT
18 APPEARS ON THE SCREEN AND NOT THE COMPUTER JARGON THAT
19 REPRESENTS THAT TEXT?

20 MR. SCHERKENBACH: NO.

21 THE COURT: WHAT IS YOUR --

22 MR. SCHERKENBACH: I, ACTUALLY, THINK WE'RE
23 MAYBE A LOT CLOSER THAN IT SEEMS. I THOUGHT I HEARD
24 MR. HAYES SAY THREE TIMES THAT THE FIRST INFORMATION IS
25 WHAT THE USER TYPES IN THE DOCUMENT; WE AGREE. I

1 THOUGHT THAT WAS OUR POINT. AND THAT IT IS VISIBLE; WE
2 AGREE. TO DETERMINE WHAT THAT INFORMATION IS, THE
3 COMPUTER CAN LOOK AT ALL SORTS OF STUFF; SURE. I MEAN,
4 IN FACT, THE PORTION OF COLUMN 4 THAT MR. HAYES POINTS
5 TO, HE'S RIGHT. THE PATENT SAYS THAT -- LOOKING AT THE
6 SAME LINES, YOUR HONOR, COLUMN 4 BEGINNING AT LINE
7 29 -- THE PROGRAM ANALYZES WHAT THE USER HAS TYPED BY
8 DOING A NUMBER OF THINGS, ONE OF THE THINGS IT CAN LOOK
9 AT IS FORMATTING. SURE. IT CAN LOOK AT HIDDEN CODES,
10 IT CAN LOOK AT ALL SORTS OF THINGS. BUT THE POINT IS
11 WHATEVER THE PROGRAM IS LOOKING AT AND ANALYZING, IT'S
12 BEING DONE TO DETERMINE WHAT HAS THE USER TYPED AND
13 WHAT IS THE USER SEEING ON THE SCREEN.

14 MR. HAYES: WE DON'T DISAGREE WITH THAT, BUT THE
15 PROBLEM IS YOU CAN'T --

16 THE COURT: I THINK YOU DID.

17 MR. HAYES: WE DON'T DISAGREE, BUT IT IS -- THE
18 PROBLEM THE WAY THAT CONSTRUCTION IS YOU'D THINK I'D
19 HAVE TO PROVE THEY HAVE AN OPTICAL SCANNER, BECAUSE
20 THEY ARE NOT, YOU KNOW -- I MEAN ANALYZING THE
21 DOCUMENT, I THINK THE JURY CAN FIGURE THAT ONE OUT. I,
22 FRANKLY, DON'T THINK THERE'S ANY PARTICULAR REASON TO
23 DO ANY INGRAINED CLAIM CONSTRUCTION ON IT ON ITS OWN.
24 PEOPLE KNOW WHAT ANALYZING MEANS. I MEAN, HOW IN GOD'S
25 GOOD NAME DOES IT FIND IT TO INSERT IT, IF IT DOESN'T

1 LOOK AT IT.

2 THE COURT: MY POINT IS THIS, THIS IS WHERE I
3 STARTED, AND I SEEMED TO HAVE CONFIRMED THIS. IT
4 DOESN'T SEEM TO ME THAT THERE IS ANY DISAGREEMENT ABOUT
5 WHAT ANALYZING THE DOCUMENT IS. AT FIRST I THOUGHT
6 THAT, OR AT LEAST YOU THOUGHT, MR. HAYES, AND
7 MR. SCHERKENBACH WAS SAYING WHAT THAT MEANS IS A
8 PROGRAM GOES THROUGH THE LETTERS IN THE DOCUMENT AND
9 SEES IF ALL THE LETTERS ARE THE SAME, AND INSTEAD OF
10 BEING ABLE TO LOOK AT THE UNDERLYING --

11 MR. HAYES: METADATA, RIGHT.

12 THE COURT: YES. NOW, AS I UNDERSTAND IT,
13 THAT'S NOT WHAT MR. SCHERKENBACH IS SAYING?

14 MR. HAYES: I THINK HE AGREES WITH ME BECAUSE
15 I'VE POINTED OUT THE FORMATTING.

16 THE COURT: I DON'T KNOW IF HE AGREES WITH YOU,
17 BUT AT LEAST IT DOESN'T SEEM TO BE WHAT THE BONE OF
18 CONTENTION IS.

19 MR. SCHERKENBACH: YOUR HONOR, ONE THING I'M
20 HAPPY TO DO IF THIS NARROWS THE DISPUTE FURTHER, THE
21 LANGUAGE ABOUT MATCHING PREDEFINED TEXT OR TEXT
22 PATTERNS IN OUR PROPOSED CONSTRUCTION, WE DON'T HAVE TO
23 HAVE THAT, AND IF THAT'S OBJECTIONABLE TO MR. HAYES, WE
24 CAN TAKE THAT PART OF IT OUT.

25 IF WE AGREE FIRST INFORMATION IS TEXT ENTERED

1 INTO THE DOCUMENT THAT IS INVISIBLE TO THE USER; FINE,
2 IT SOUNDS LIKE WE AGREE ON THAT AND IF THAT'S TRUE THAT
3 SPEAKS RESULT --

4 MR. HAYES: THE PROBLEM, JUDGE, IS THAT IT IS
5 CONFUSING, I THINK, AS ALL GET-OUT TO THIS JURY IF
6 SOMEONE SAYS, WELL, YOU HAVE TO ANALYZE WHAT'S VISIBLE.
7 NO COMPUTER ANALYZES WHAT'S VISIBLE TO THE USER. IT
8 JUST DOESN'T WORK THAT WAY.

9 SO I GUESS I WILL LEAVE IT TO YOUR INFINITE
10 WISDOM TO RESOLVE THIS. ANOTHER REASON TO HATE THIS
11 BUSINESS OF PATENT LAW, I'LL TELL YOU.

12 THE COURT: WELL, FRANKLY, IT SEEM TO ME THAT, I
13 UNDERSTAND, I THINK, THE FIRST DISAGREEMENT, THE UPON A
14 SINGLE ENTRY OF THE EXECUTE COMMAND. I CAN UNDERSTAND
15 THE DIFFERENT POSITIONS YOU'VE TAKEN. BUT I'M HAVING
16 GREAT DIFFICULTY IN UNDERSTANDING HOW YOUR POSITIONS
17 ARE ANY DIFFERENT WITH RESPECT TO THIS ANALYZING THE
18 DOCUMENT TO DETERMINE IF THE FIRST INFORMATION IS
19 CONTAINED THEREIN.

20 MR. HAYES: WELL, WHY DON'T WE SAY THIS: FIRST
21 INFORMATION IS TEXT IN THE DOCUMENT THAT IS ENTERED BY
22 THE USER. PERIOD. THAT'S IT. AND THAT'S WHAT IT IS.
23 SO THEY CAN ANALYZE THAT. AND THAT CAN BE ANALYZED IN
24 A VARIETY OF WAYS, INCLUDING METADATA, ETC. , BUT I
25 DON'T THINK WE HAVE TO ARGUE THAT WITH THE JURY AT THIS

1 POINT. WE'LL HAVE TO WRITE A TREATY ON WHAT THE WORD
2 ANALYZE MEANS.

3 THE COURT: I THINK PROBABLY THE ROOT OF THE
4 PROBLEM IS IN THIS FALSE DISPUTE, SEEMS TO BE WITH THE
5 DIFFERENT WAYS IN WHICH THE TWO OF YOU ARE READING
6 VISIBLE.

7 IS VISIBLE NECESSARY IN YOUR VIEW,
8 MR. SCHERKENBACH?

9 MR. SCHERKENBACH: I THINK WE CAN LIVE WITHOUT
10 VISIBLE, THOUGH, I HOPE WE'RE NOT GOING TO HEAR AN
11 ARGUMENT THAT TEXT THAT'S ENTERED BY THE USER IS
12 SOMEHOW NOT VISIBLE. BUT TO ME, IN A WAY, THE
13 VISIBILITY PART IS INCLUDED IN THE NOTION THAT IT IS
14 ENTERED BY THE USER, SO I WOULD BE OKAY WITH THAT
15 CONSTRUCTION.

16 MR. HAYES: WELL, THERE'S ALWAYS A CLINK IN
17 EVERY ARMOR. MY BROTHER, WHO KNOWS MORE ABOUT THIS
18 THAN I DO, SAYS, WELL, WHAT HAPPENS IF MR. SCHERKENBACH
19 SENDS ME AN E-MAIL, HE E-MAILS ME THE INFORMATION AND
20 THE USER, I DIDN'T ENTER IT; I MEAN, COME ON, THAT'S A
21 PROBLEM. I JUST THINK FIRST INFORMATION IS -- WE COULD
22 LIVE WITH FIRST INFORMATION IS THE INFORMATION ENTERED
23 BY THE USER OR RECEIVED BY -- ENTER OR RECEIVED BY THE
24 USER, SO THAT --

25 THE COURT: I GUESS THE FIRST QUESTION,

1 ESPECIALLY APPLICABLE TO THIS PARTICULAR ISSUE, IS THE
2 FIRST QUESTION IS DO THESE TERMS NEED CONSTRUCTION; AND
3 IF SO, WHY DO THEY NEED TO BE CONSTRUED? WHAT IN THAT
4 PHRASE, "ANALYZING THE DOCUMENT TO DETERMINE IF THE
5 FIRST INFORMATION IS CONTAINED THEREIN" REQUIRES
6 CONSTRUCTION, OTHER THAN, PERHAPS, THE TERM "FIRST
7 INFORMATION," MAYBE ARGUABLY, BUT ASIDE FROM THAT, WHAT
8 NEEDS TO BE CONSTRUED?

9 MR. SCHERKENBACH: I AGREE. I THINK IF WE GET
10 AN AGREED CONSTRUCTION ON FIRST INFORMATION, THAT WE
11 DON'T NEED A SEPARATE CONSTRUCTION OF THE ENTIRE
12 ANALYZING LIMITATION.

13 THE COURT: ALL RIGHT, LET'S TAKE FIRST
14 INFORMATION, THEN.

15 MR. SCHERKENBACH'S PROPOSED CONSTRUCTION THERE,
16 MR. HAYES, IS FIRST INFORMATION MEANS TEXT IN THE
17 DOCUMENT THAT IS ENTERED BY, INVISIBLE TO THE USER --
18 AND THERE WE GO AGAIN WITH THE INVISIBLE TO -- AND THAT
19 MATCHES PREDEFINED TEXT OR TEXT PATTERNS?

20 MR. HAYES: NO, NO, BECAUSE THAT'S TRYING TO
21 BOOT OUT METADATA AND IT DOESN'T DO THAT.

22 MR. SCHERKENBACH: AND I'LL CONCEDE THAT THAT
23 LAST PHRASE CAN BE TAKEN OUT.

24 THE COURT: WHICH LAST PHRASE?

25 MR. SCHERKENBACH: AFTER THE COMMA, "AND THAT

1 MATCHES PREDEFINED TEXT OR TEXT PATTERNS," STRIKE THAT
2 OUT.

3 MR. HAYES: FIRST INFORMATION IS WHAT? "IS TEXT
4 IN THE DOCUMENT ENTERED BY THE USER." HOW ABOUT THAT?

5 MR. SCHERKENBACH: I'M FINE WITH THAT.

6 MR. HAYES: OKAY, WE DID IT.

7 THE COURT: OKAY. GEE, WHILE WE'RE ON A ROLL,
8 MAYBE WE OUGHT TO GO BACK TO THE FIRST ONE.

9 MR. HAYES: I THINK THEY SHOULD UP THEIR OFFER,
10 WE COULD GET OUT OF HERE.

11 THE COURT: LET'S GO BACK TO THE FIRST ONE.

12 AS TO THE WORD "UPON," DO YOU DISAGREE,
13 MR. HAYES, THAT UPON MEANS ON OR IMMEDIATELY OR VERY
14 SOON THEREAFTER OR SOON AFTER?

15 MR. HAYES: NO.

16 THE COURT: YOU DON'T AGREE?

17 MR. HAYES: I AGREE. UPON MEANS AFTER. YOU
18 KNOW, UPON, LIKE --

19 THE COURT: SO THE CORE OF THE DISAGREEMENT,
20 THEN, IS WHAT CONSTITUTES --

21 MR. HAYES: I'M SORRY, JUDGE, I DIDN'T CATCH THE
22 QUESTION.

23 MR. FEHER: I APOLOGIZE, YOUR HONOR.

24 MR. HAYES: I'M SORRY, I DIDN'T CATCH THE
25 QUESTION.

1 THE COURT: I HADN'T FINISHED IT YET, I WAS
2 WAITING FOR MR. FEHER TO FINISH.

3 THE CORE OF THE DISAGREEMENT, THEN, SEEMS TO BE
4 WHAT IS MEANT BY A SINGLE ENTRY OF THE EXECUTE COMMAND.
5 YOU DISAGREE AS TO WHAT CONSTITUTES AN ENTRY OF "THE"
6 OR "AN" EXECUTE COMMAND, ISN'T THAT WHAT THIS BOILS
7 DOWN TO?

8 MR. HAYES: WELL, IT SAYS "BY THE INPUT DEVICE."
9 YOU CAN'T READ -- I MEAN YOU HAVE TO LOOK AT THE CLAIM,
10 -- I'LL PUT IT UP. IT SAYS, "UPON A SINGLE ENTRY OF
11 THE EXECUTE COMMAND BY MEANS OF THE INPUT DEVICE."
12 "THE EXECUTE COMMAND" IS REFERRING TO THE EXECUTE
13 COMMAND, THE PRECEDENT OR PREDICATE FOR IT IS THE ONE
14 UP THERE THAT SAYS, IT'S A COMMAND WHICH INITIATES A
15 RECORD RETRIEVAL. I THINK IT IS AS CLEAR AS A BELL IF
16 YOU CAN READ ENGLISH. I DON'T THINK ANYTHING NEEDS TO
17 BE CONSTRUED ON THIS ONE.

18 THE COURT: WELL, IT SEEMS TO ME THAT WHAT
19 YOU'RE DISAGREEING ON, ALL I'M TRYING TO ESTABLISH IS
20 WHAT THE DISAGREEMENT IS, AND IT SEEMS TO ME THAT WHAT
21 THE DISAGREEMENT HERE IS WHAT CONSTITUTES AN ENTRY OF
22 "AN" OR "THE" EXECUTE COMMAND, ISN'T THAT WHAT THIS
23 COMES DOWN TO?

24 YOU SAY, MR. HAYES, THAT ENTRY OF THE EXECUTE
25 COMMAND MEANS THE CLICKING OF THE MENU ITEM THAT TELLS

1 THE PROGRAM TO FIND ANY ADDRESSES THAT MAY BE
2 ASSOCIATED WITH THIS NAME.

3 MR. HAYES: YES, SIR.

4 THE COURT: AND MR. SCHERKENBACH SAYS THAT THAT
5 MAY BE ONE EXAMPLE OF ENTRY OF AN EXECUTE COMMAND, OR
6 HE SAYS AN EXECUTE COMMAND, IT MAY BE ONE EXAMPLE, BUT,
7 IN ADDITION, WHEN YOU MOVE THE CURSOR TO THE -- WHEN
8 YOU CLICK THE ICON TO DISPLAY THE MENU, THAT THAT'S
9 ENTRY OF AN EXECUTE COMMAND. RIGHT?

10 MR. HAYES: RIGHT.

11 MR. SCHERKENBACH: YES.

12 THE COURT: NOW, THAT BRINGS ME BACK TO THE
13 QUESTION THAT I ALLUDED TO EARLIER, AND THAT IS WHERE
14 THE LINE IS BETWEEN CONSTRUING A TERM, WHICH,
15 SUPPOSEDLY, CONSTRUING A TERM BASED ON -- WELL, THE
16 DIFFERENCE BETWEEN CONSTRUING A TERM AND FINDING FACTS
17 WITH RESPECT TO HOW THE DEVICE OPERATES. WHAT DO YOU
18 HAVE TO SAY ON WHICH CATEGORY DEFINING THIS TERM, A
19 SINGLE ENTRY OF THE EXECUTE COMMAND, WHICH OF YOUR
20 CONFLICTING PROPOSALS FALLS IN TO? IS THAT CLAIM
21 CONSTRUCTION OR IS THAT A FACTUAL QUESTION?

22 MR. HAYES: I THINK IT'S A FACTUAL QUESTION,
23 FRANKLY, FOR THE JURY, ONLY BECAUSE I THINK THE
24 LANGUAGE, AS WRITTEN, AND AS CONCEDED BY THEIR EXPERT
25 IS UNAMBIGUOUS. I MEAN UPON, A JUROR IS GOING TO KNOW

1 THAT UPON MEANS ON OR AFTER, RIGHT. SINGLE, THEY ARE
2 GOING TO KNOW IT MEANS ONE. MENU, INPUT DEVICE, THEY
3 ARE GOING TO KNOW CAN BE A BUTTON OR A MENU.

4 THE COURT: WELL, ENTER AN EXECUTE COMMAND ARE
5 THE TOUGH WORDS, YOU SKIPPED OVER THOSE.

6 MR. HAYES: NO, I'M GOING TO GET TO THOSE. I
7 ALWAYS GET TO THE TOUGH ONES LAST, JUDGE, I GET ON A
8 SEMI-ROLL.

9 NOW, THE EXECUTE COMMAND HAS ITS PREDICATE AS A
10 MATTER OF LAW ABOVE. AND, SO, IF THE QUESTION WAS WHAT
11 IS THE EXECUTE COMMAND, AN EXECUTE COMMAND IS A COMMAND
12 WHICH, QUOTE, "WHICH INITIATES A RECORD RETRIEVAL
13 PROGRAM FROM AN INFORMATION SOURCE USING THE RECORD
14 RETRIEVAL PROGRAM."

15 THE COURT: WELL, THIS SOUNDS LIKE CLAIM
16 CONSTRUCTION IN THE WAY YOU'RE PHRASING IT.

17 MR. HAYES: NO, THERE'S NOTHING TO CONSTRUE.
18 THE QUESTION IS -- I'M NOT CONSTRUING IT, I'M READING
19 IT. THEY'RE TRYING TO CONSTRUE IT --

20 THE COURT: WELL, YOU ARE CONSTRUING IT, BECAUSE
21 YOU ARE READING FROM OTHER PORTIONS OF THE PATENT,
22 AREN'T YOU?

23 MR. HAYES: NO, READING FROM THE CLAIM. I'M NOT
24 READING FROM ANYTHING OTHER THAN THE CLAIM ITSELF.

25 THE COURT: OTHER PORTIONS OF THE CLAIM.

1 MR. HAYES: NO. WHAT IF IT SAID HERE, LET'S BE
2 STUPID HERE, UPON ENTRY OF THE ELEPHANT, THE ELEPHANT.
3 AND ABOVE IT IT SAYS, PROVIDING AN ELEPHANT WITH A BLUE
4 TRUNK. THAT'S IT. WHAT IS THE ELEPHANT? IT'S THE ONE
5 WITH A BLUE TRUNK.

6 THE COURT: LET ME PUT IT A DIFFERENT WAY. IS
7 THERE ANY FACTUAL DETERMINATION THAT YOU BELIEVE HAS TO
8 BE MADE IN ORDER TO DETERMINE WHAT SINGLE ENTRY OF THE
9 OR AN EXECUTE COMMAND MEANS? ANY FACT THAT HAS TO BE
10 FOUND TO MAKE THAT DETERMINATION?

11 WHAT DO YOU SAY ON THAT, MR. SCHERKENBACH?

12 MR. SCHERKENBACH: THE ANSWER IS NO. IT'S
13 PURELY A LEGAL ISSUE, AND IT HAS TO BE RESOLVED WITH
14 REFERENCE TO THE PROSECUTION HISTORY, AS WE EXPLAINED
15 IN OUR BRIEF. YOU CAN'T ANSWER THE QUESTION --
16 DEBATING MR. HAYES ON THE WAY YOU READ THE CLAIM ALONE
17 IN ISOLATION, I THINK WHILE MAY BE INTERESTING, IS NOT
18 REALLY THE WHOLE EXERCISE HERE, BECAUSE, OF COURSE, YOU
19 HAVE TO CONSIDER THE PROSECUTION HISTORY, AND THAT IS A
20 LEGAL ISSUE, AND THE IMPACT OF THAT IS A LEGAL ISSUE,
21 THERE'S NO FACTS FOR YOU TO RESOLVE.

22 MR. HAYES: WELL, OUR POSITION ON THAT ONE,
23 JUDGE IS THAT, A, IT'S NOT AMBIGUOUS; AND, B, YOU DON'T
24 GO START INTO THE PROSECUTION HISTORY AND START READING
25 ALL THE CLAIM LIMITATIONS; AND, C, THE EXAMINER ISSUED

1 IT WITH THIS LANGUAGE IN IT, WHICH IS, I THINK, PRETTY
2 CLEAR. THIS PATENT DEFINES WHAT THE EXECUTE COMMAND
3 IS. SPECIFICALLY IT IS A COMMAND THAT INDICATES A
4 RECORD RETRIEVAL. I THINK, FRANKLY, IF YOU READ THE
5 CLAIM, GIVE IT TO THE JURY, AND HOPE FOR THE BEST LIKE
6 IN EVERY OTHER PATENT CASE.

7 THE COURT: WELL, I TRY TO DO A LITTLE MORE THAN
8 THAT.

9 MR. HAYES: WELL, I MEAN, OBVIOUSLY, WE TRY TO
10 DO A LITTLE MORE THAN THAT.

11 THE COURT: I THINK I'VE HEARD ENOUGH COUNSEL,
12 WE'LL ADJOURN.

13 MR. HAYES: CAN I TIP YOU OFF ON A POTENTIAL
14 DISPUTE?

15 MR. FEHER: YOUR HONOR, MAY I HAVE A MOMENT TO
16 TALK TO MR. HAYES FOR A SECOND?

17 THE COURT: SURE.

18 MR. SCHERKENBACH: YOUR HONOR, WHILE THAT'S
19 HAPPENING, YOU ASKED FOR OUR SPECIAL VERDICT FORMS BY
20 TODAY, WE PROVIDED THEM. I JUST WANTED TO ALERT YOU,
21 YOU'LL SEE ON OUR FORM A COUPLE OF QUESTIONS RELATING
22 TO CONTRIBUTORY INFRINGEMENT, QUESTIONS 2 AND 3;
23 MR. HAYES AND I ARE, I THINK, PRETTY CLOSE TO AGREEING
24 THAT THAT ISSUE SHOULDN'T GO TO THE JURY AND IT MIGHT
25 BE TAKEN OUT OF THE CASE. WE DON'T HAVE AN AGREEMENT

1 YET, BUT IT MIGHT HAPPEN.

2 MR. HAYES: FRANK -- I KNOW FRANK WILL AGREE
3 WITH THIS -- WHEN WE TALKED ABOUT WHAT FIRST
4 INFORMATION WAS, WE SAID IT'S INFORMATION CONTAINED IN
5 THE DOCUMENT. WHAT DID WE AGREE UPON?

6 MR. SCHERKENBACH: ENTERED BY THE USER.

7 MR. HAYES: PUT BY "A USER" INSTEAD OF "THE
8 USER."

9 MR. SCHERKENBACH: NO PROBLEM, I AGREE. I
10 UNDERSTAND THE POINT.

11 MR. HAYES: THANK YOU, JUDGE.

12 NOW, THE TIP-OFF. FRANK IS GOING TO CALL
13 MR. REYNAR AND MR. SINOFKY. AND HE'S GOING TO PROVIDE
14 TO ME, PRESUMABLY AT SOME POINT IN TIME, THEIR
15 EXHIBITS. AND I THINK WE'LL HAVE OBJECTION TO THEIR
16 EXHIBITS AND TO A BUNCH OF THINGS. SO I WOULD LIKE, IF
17 I COULD, JUDGE, AFTER I GET HIS EXHIBITS, SORT THEM
18 OUT, TRY TO NARROW THE WHOLE THING, BUT AT LEAST
19 ARRANGE A MEETING AT 8 A.M. MONDAY.

20 THE COURT: WHAT'S THE NATURE OF THE POSSIBLE
21 DISPUTE?

22 MR. HAYES: WELL, FRANKLY, THERE'S A WHOLE BUNCH
23 OF THEM. I'LL GIVE YOU SOME IDEA. REYNAR IS ONE OF
24 FIVE DEVELOPERS OF SMART TAGS, IT WAS DEVELOPED BY FIVE
25 PEOPLE, THEY ARE BRINGING REYNAR. ON THEIR EXHIBIT

1 LIST GENERALLY, THEY HAVE ALL OF REYNAR'S NOTEBOOKS,
2 PRESUMABLY TO BRING THE JURY, TRY TO TELL THE JURY HE
3 INDEPENDENTLY DEVELOPED IT, THAT'S POINT 1.
4 TWO, IS THEY HAVE A DATE OF CONCEPTION, WHICH
5 THEY SAID WAS AUGUST, WHICH IS BEFORE HEDLOY'S
6 SEPTEMBER DATE, BUT THEY'RE NOT -- AND THAT WAS TO FAWN
7 OFF COPYING, VIS-A-VIS THE SHOW. THEY'RE NOT ALLEGING
8 HIM BEING A PRIOR INVENTOR OR USING HIM AS A DEFENSE,
9 THEIR EXPERT HASN'T OPINED ON ANY OF THAT. SO I THINK
10 REYNAR'S ROLE, SO TO SPEAK HERE, GIVEN THAT WE NOW HAVE
11 A PATENT CASE AS OPPOSED TO I CAN'T TALK ABOUT COPYING,
12 I CAN'T TALK ABOUT DEVELOPMENT, WE CAN'T TALK ABOUT ANY
13 OF THAT STUFF, WE'RE DOWN TO -- WHICH YOU HAVE DONE A
14 GOOD JOB, ACTUALLY, OF BRINGING IT DOWN TO A PATENT
15 CASE -- BUT THAT SAID, BUT UNFORTUNATELY FOR ME, BUT
16 THAT'S ALL RIGHT, THAT'S WHAT I DO -- HE SHOULD BE
17 RESTRICTED TO SIMPLY SAYING, I'M REYNAR, I'M A
18 DEVELOPER OF SMART TAGS, AND THIS IS HOW IT WORKS, TO
19 THE EXTENT HE KNOWS. WHAT HE SHOULDN'T BE ALLOWED TO
20 DO IS SAY, WELL, I CONCEIVED THIS IN AUGUST AND IMPLANT
21 SOMETHING IN THE JURY THAT, IN FACT, IT WAS BEFORE
22 ATLE, WHICH HAS NOTHING TO DO WITH THAT ISSUE, BECAUSE
23 THEY'RE NOT RAISING IT ON VALIDITY. AND HERE ARE MY
24 DEVELOPMENT NOTES, LIKE I DID IT INDEPENDENTLY AND I
25 DIDN'T STEAL IT. AND HE CAN'T ASK HIM IF HE STOLE IT,

1 BECAUSE THAT'S GOING TO THE NEXT TRIAL, IF IT EVER GETS
2 THERE. SO, I MEAN, THAT'S THE CONCERN THAT I HAVE.
3 NOW, IF FRANK'S NOT GOING TO DO ANY OF THAT, THEN WE
4 CAN MOVE ON.

5 MR. SCHERKENBACH: I THINK MR. HAYES SHOULD WAIT
6 TO SEE THE EXHIBIT LIST, ACTUALLY.

7 THE COURT: CAN YOU EXPLAIN TO ME WHAT THE ISSUE
8 IS GOING TO BE IF IT ARISES?

9 MR. SCHERKENBACH: MR. REYNAR IS NOT GOING TO
10 TALK ABOUT THE DEVELOPMENT OF SMART TAGS IN ANY DETAIL.

11 WE ACTUALLY DISCUSSED THIS, YOUR HONOR, IF
12 YOU'LL RECALL, WHEN YOU TALKED ABOUT THE POSSIBILITY
13 THAT THE COPYING EVIDENCE COULD BE INTRODUCED IF WE
14 OPENED THE DOOR ON TELLING IT, SOME INDEPENDENT
15 DEVELOPMENT STORY. WE'RE NOT GOING TO TELL THAT STORY,
16 IT'S NOT RELEVANT TO THE ISSUES IN THIS CASE, SO I
17 DON'T THINK WE'RE GOING TO HAVE A DISPUTE.

18 MR. HAYES: AND WE'RE NOT GOING TO TALK ABOUT
19 CONCEPTION IN AUGUST ON AN AIRPLANE WITH A NAPKIN
20 THAT'S MISSING?

21 MR. SCHERKENBACH: CORRECT.

22 MR. HAYES: WE JUST RESOLVED THAT ONE. NOW IF
23 WE COULD GET TEN MINUTES, MAYBE WE COULD GET RID OF THE
24 NEXT ONE. NEXT ONE IS SINOFISKY.

25 THE COURT: DO WE NEED TO BE ON THE RECORD FOR

1 ALL OF THIS?

2 MR. HAYES: I DON'T THINK SO.

3 (OFF THE RECORD)

4 (ADJOURNED 4:50 P.M.)

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I, ANGELA M. GALLOGLY, RPR, DO HEREBY

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CERTIFY THAT THE FOREGOING PAGES ARE A TRUE AND

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ACCURATE TRANSCRIPTION OF MY STENOGRAPHIC NOTES IN THE

9

ABOVE-ENTITLED CASE.

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ANGELA M. GALLOGLY, RPR

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